In the Supreme Court of the United States

OCTOBER TERM, 1897.

No. 383.

EDWARD M. WILLIS AND WILLIAM G. JOHNSON, ASSIGNEE, *Plaintiffs in Error,*

vs.

EASTERN TRUST AND BANKING COMPANY, A CORPORATION, *Defendant in Error.*

BRIEF FOR DEFENDANT IN ERROR.

STATEMENT OF CASE.

These cases were brought before Lewis I. O'Neal, a justice of the peace in and for the District of Columbia, to obtain possession under the Landlord and Tenant Act, of certain real estate situated in said District, fully described in the pleadings herein. The plaintiff in error interposed pleas of title, and gave bond as provided by law, and the cases were thereupon certified to the Supreme Court of the District of Columbia, for trial. The defendant in error filed a declaration of ejectment as required by the rules of said court, and the cases being thus at issue, the parties thereto entered into an agreed statement of fact in writing. whereby said causes were to be submitted to the court for its determination, without a jury. The substance of said agreement is as follows, to wit:

The defendant in error is a body corporate, organized

under the laws of the State of Maine, and having its principal place of business at the City of Bangor, in that State. The American Ice Company, also a body corporate, organized under the laws of said State, and doing business therein, and also in the District of Columbia, did on the 2d day of December, A. D. 1889, execute and deliver unto the Eastern Trust and Banking Company a certain deed of trust in the nature of a mortgage, upon certain real estate described therein, a part of which is situated in the State of Maine, and the remainder in the City of Washington, District of Columbia, to secure the payment of its certain bonds of various denominations, aggregating $40,000, payable to the order of the said defendant, in three, four, five, six, seven, eight and nine years after date, with interest thereon at the rate of six per cent. per annum. Said deed of trust was duly recorded in the land records of the District of Columbia. The original deed bears the impress of the corporate seal of the American Ice Company, and of the Eastern Trust and Banking Company, upon or near the names of said companies subscribed to said deed of trust, and it is admitted that said seals were affixed to said deed at the time of or before the execution and delivery thereof, and as required by the witnessing clause thereto, and that the Recorder of Deeds failed to note the same upon the records. The bonds were executed and delivered in due form of law to said Trust Company, and by it delivered to the parties entitled thereto by the terms and provisions of said deed of trust. Said bonds were taken by the parties to whom they were delivered for value, in the regular course of business, before maturity, and are now held and owned by them or by their assigns or legal representatives, except as to the first instalment thereof, which fell due December 2, 1892, which was paid, together with the interest accrued and due upon all of said bonds. The next instalment of bonded indebtedness which became due in December, 1893, was not paid, nor was the interest then falling due paid, nor have either of

said sums or any part of them been since paid or satisfied in any manner. The parties holding said bonds have not, nor have any of them waived their rights to said payments, in accordance with the tenor and effect of said bonds, and of said deed of trust, by the terms of which the residue of said bonded indebtedness, to wit, the sum of $35,000, together with accrued interest thereon, was, at the commencement of these suits, due and payable.

On the 13th day of October, A. D. 1893, the American Ice Company, by an instrument of writing of that date, executed and delivered in due form of law, made an assignment of all of its property, of what kind soever, for the benefit of its creditors, to Wm. G. Johnson, plaintiff in error, who accepted the trust, and entered upon its discharge. Subsequently, as such assignee, he leased that portion of the real estate which is situated in the city of Washington unto Edward M. Willis, one of the plaintiffs in error, who entered and took possession thereunder, and still retains possession.

Said lease is in writing, and bears date January 29, A. D. 1894, and is for the period of one year from said date, for rental of $130 per month (Record, 4, 5, 6).

After the default in the payment of the second instalment of bonds, and of the interest on the bonded indebtedness had continued for a period of more than ninety days, the bondholders, or those holding more than 50 per cent. of the value thereof, directed the said trustee to proceed in the execution of said trust in accordance with its terms and provisions; in pursuance of which direction the said defendant, on the 30th day of July, 1894, caused a thirty days' notice to quit to be served upon each of the plaintiffs in error, on the theory that they were statutory tenants by sufferance under the law, and that the instrument securing the indebtedness created the relation of landlord and tenant between the said Trust Company and plaintiffs; and thereafter, to wit, on the 17th day of September, 1894, the said defendant caused a seven days' summons to be issued by Lewis I. O'Neal, a justice of

the peace, as aforesaid, as provided by Sec. 684 of the Revised Statutes of the United States relating to the District of Columbia, against each of said plaintiffs, who appeared, and the case proceeded as hereinbefore stated. After the default had been made in the payment of said bonds, and the interest thereon, in pursuance of the direction of the bondholders, and of the powers conferred upon and vested in defendant by said deed of trust, it advertised said real estate for sale, in accordance with the requirements of said deed of trust, and exposed the same for sale at public auction, in the city of Bangor, at which sale a committee, acting for said bondholders, purchased the property embraced in the deed of trust for the bondholders benefit. The terms of said sale have not yet been complied with, and no deed has been made to the purchasers, it being understood and agreed between the purchasers and the defendant that said trustee should first obtain possession of the property (Record, 6 and 7).

The details of the transaction were not set forth at length in the agreed statement of facts because of a desire, believed to be mutually entertained by counsel on both sides, to avoid cumbering the record with unnecessary matter. Why, therefore, counsel should now complain in their brief that "To whom the property was sold, for what price, and upon what terms, nowhere appears," is not understood. No concealment was attempted on these or any other points on the part of defendant in error, and all that counsel on the other side recommended or suggested was inserted in the agreed statement of facts.

Judgment was rendered for said defendant in the Court of Appeals for the District of Columbia, whereupon plaintiffs brought the cases to this court on writ of error. Here, upon motion and argument, the writ of error was dismissed for want of jurisdiction (167 U. S. 76), and the cases are now before the court on writ of *certiorari* subsequently issued, on petition of plaintiffs in error, to said Court of Appeals.

ARGUMENT.

The points of law raised by the record are:

1. Does the law prevailing in the District of Columbia permit the defendant to act as trustee, and to execute the trust conferred upon it by the deed of trust in controversy?

2. How does the omission of the Recorder of Deeds to copy the corporate seals upon his records, affect the defendant's right to recover.

3. Is the power of sale in the deed of trust void? If so, how does its invalidity affect the defendant's right to recover?

4. Was the defendant entitled to appeal to the Landlord and Tenant Act in force in the District of Columbia to obtain possession of the property in controversy prior to the sale, and if so, how was that right affected by the sale?

1. A charter of incorporation imparts to the body corporate individuality and personality. Within its scope, terms and provisions, the corporation may do whatever a natural person, acting in his legal capacity, might do. This faculty, thus created, it possesses and may exercise as certainly as may an individual, not only in the place of its creation, but elsewhere, unless forbidden by law or the policy of the foreign State.

> "Beyond, as well as in the limits of the domestic sovereignty, the only difference between a natural and an artificial person, as to the recognition of their personal existence, would be, that wherever the law creating the latter should be recognized, the existence of such a being would be legal only, while that of the other would be actual as well as legal; and this is the reason why, in the absence of any local law or policy to the contrary, the same code of

comity will apply to both of them in the courts of all liberal and enlightened nations."

Lathrop *vs.* The Commercial Bank of Scioto, 8 Dana, 114.

Connecticut Mutual Life Insurance Co. *vs.* Cross et al., 18 Wis. 119.

Cowell *vs.* Springs' Co., 100 U. S. 56.

The defendant's charter provides that it shall be possessed of all the powers, privileges, and immunities, and subject to all the duties and obligations conferred upon corporations by law, except as provided therein; it empowers the corporation *inter alia*, to hold by grant, assignment, transfer, devise or bequest, any real or personal property, or trust duly created, and to execute trusts of every description. Sections 1 and 3 (Record, p. 8). The power to act as trustee, and to execute the trusts created by the conveyance of December 2, 1889, is thus expressly conferred, and can not be questioned in defendant's domicile. The charter does not forbid the defendant from acting in the quality of trustee or agent, or of exercising any of the powers conferred upon it, elsewhere than in Maine. An express authorization to exercise its chartered powers in a foreign State, would be simply nugatory. The right, privilege, or power sought to be exercised, is not, strictly speaking, a franchise, but a right belonging to a corporation equally with an individual, and may be exercised here, unless some statute either distinctly forbids it, or indicates that such exercise is opposed to local public policy. The question is a legislative and not a judicial one. Said Chief Justice Christiancy in Thompson *vs.* Waters:

"In ascertaining what the legislative policy is, we are to be guided not only by such express provisions as they have chosen to make and the natural implications from them, but also from silence which may furnish as clear an indication of what that policy was intended to be, as can be drawn from what they

have expressed; since, if they have made no provision at all upon that particular subject or branch of the subject or question involved, they intended to adopt, and left the courts to apply the generally received principles of comity, and to that extent to adopt the foreign law; and if they have chosen to leave the matter without any legislative provision, the case ought to be a very clear one indeed, which will authorize the courts to refuse such recognition on the ground that it would be prejudicial to the State."

25 Mich. 214.

There is no statutory inhibition or expression of legislative judgment that it is against the interests of the citizens of this jurisdiction to permit a foreign corporation to exercise the powers and discharge the duties imposed upon the defendant by the deed of trust under consideration.

2. The deed of trust to defendant was duly recorded and acknowledged. Its delivery passed the title to the grantee, *in præsenti*, and whether recorded or not, was good as against the grantor and his assigns without consideration. Were authorities needed to support a proposition so fundamental and well established, they are abundant.

Hastings *vs.* Vaughn, 5 Cal. 315.
Strong *vs.* Smith, 3 McLean, 362.
Stevenson *vs.* Cloud, 5 Blachf. 92.
Dole *vs.* Thurlow, 12 Metc. 157.
Brown *vs.* Moulton, 22 N. H. 468.
Jackson *vs.* Allen, 30 Ark. 110.
McMahon, 26 Wis.

The instrument is also good as to creditors and purchasers without notice and for valuable consideration. It was properly acknowledged, and was by law entitled to record.

Richardson's Supplement, Ch. 69, page 315 (Vol. 1)

The absence of the seals from the record may have in legal effect changed the character of the writing from a sealed to an unsealed instrument, as to parties having the right to rely upon the record, but it created a lien of record, of which parties dealing with the property were bound to take notice, equally as though no error had occurred in recording the deed of trust; much less can the plaintiffs, holding the title of the American Ice Company, and standing in its place with its rights not enlarged or qualified by the recording act, take advantage of the error.

3. A power of sale granted by a mortgagor on the creation of the mortgage does not conflict with the principles of equity embraced in the maxim "once a mortgage always a mortgage," or to the rules of equity as applied to mortgages. The object of a deed of trust is to secure a debt; to effect that purpose the power of sale must exist somewhere, either in express terms in the instrument itself, to be exercised as therein provided, or in some tribunal charged with the enforcement of such securities. A sale by the court is only a mode of applying the pledged property to the satisfaction of the debt. No other agent to make the sale being designated in the instrument creating the pledge, the exercise of the power by implication is referred to the courts, but it does not follow that it is not equally competent for the grantor by express language to designate some person or corporation to make it. No legal principle is thereby violated.

Said Chief Justice Gordon in Lawrence *vs.* The Farmers' Loan and Trust Co.:

> "The power to dispose of the property to satisfy the debt for which it is pledged is not collateral, but like the right of redemption, inheres in the subject. It is not an addition to the mortgage, but a part of it, and the mode in which it may be exercised is as proper a subject of agreement *prima facie*, as the terms of the mortgage itself."
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> 13 N. Y. 209.

Such a power is sustained by English and American authorities alike.

Croft *vs.* Powell, Comyn R. 603.
Sowder *vs.* Morgan, 18 Vesey, 344.
Nothie *vs.* Edwards, 2 Colger R. 465.
Davy *vs.* Durant, 1 DeG. & J. 335.
Montague *vs.* Davis, 12 Allen, 397.
Elliott *vs.* Wood, 45 N. Y. 71.

Whether this be or be not the correct view of the case, it is immaterial to determine. The question is not whether the power of sale contained in the deed of trust is valid or invalid, or the sale made thereunder is valid or void. The remedies at law and in equity of the *cestuis que trustent* are concurrent. The adoption of the one does not exclude the other. Whether they are entitled to obtain possession through their trustee under the proceedings instituted in these causes depends upon the provisions of the deed of trust and the laws of this jurisdiction. And this brings us to the principal question in the case.

4. The estate limited in the premises and *habendum* of the deed of trust is a fee. Both the limiting clauses contain apt and technical language to create that estate. The first article of the declaration of trust provides that—

> "the American Ice Company shall be permitted and suffered to possess, manage, develop, operate, and enjoy the plant and property herein conveyed, and intended so to be, and to take and use the income, rents, issues, and profits thereof in the same manner, to the same extent and with the same effect as if this deed had not been made,"

until default was made in the payment of the principal or interest on said bonds, or some of them, or in respect to some of the things to be done on the part and behalf of the

grantor. The power to take possession and sell is found in the second of said articles, and is in the following language:

> "But if default shall be made by the said American Ice Company in the payment of said bonds or of any of them at the time they fall due and payable, or if said American Ice Company shall fail to pay said coupons or any of them according to the tenor thereof on the presentation and surrender of the same respectively, or if it shall fail faithfully to observe the requirements made of it by these presents, and such default shall continue for the space of ninety days, then the whole amount of the principal of said bonds, together with all accrued and unpaid interest thereon (unless such default be waived by the holders of the majority of the bonds then outstanding as hereinafter provided) shall be deemed immediately due and payable; and it shall be lawful for the trustee to enter into or upon the premises and property hereby granted or intended so to be, and to take possession of the whole or any part thereof, and to sell and dispose of all and singular the premises, property, rights, interests, and franchises hereby conveyed or mortgaged, or intended so to be, or such portion as the trustee may deem necessary, at public auction in said Bangor upon such terms as to credit, partial credit, and security for payment as it may think proper or expedient, having first given public notice of the time and place of the sale or sales by advertisement printed not less than once a week for at least four successive weeks in one or more newspapers printed and published in said Bangor, and also in Washington aforesaid. The trustees shall have the right to adjourn such sale or sales from time to time in its discretion, giving reasonable notice of each adjournment, and after so adjourning to make the sale at the time and place to which the same may be adjourned; and no other notice or demand whatsoever to and upon the party of the first part shall be necessary."

This power of sale is expressly made cumulative with the ordinary remedy of foreclosure, by entry, suit or otherwise.

The clause in the deed of trust, permitting the American Ice Company to retain possession of the property until default, is similar in language and identical in legal effect with the clause in the deed of trust considered and interpreted by the Court of Appeals of the District of Columbia in the recent case of Loring *vs.* Bartlett.

Chief Justice Alvey, speaking for the court, said:

> "The effect of the deed to the trustees was to vest the fee simple estate in them from the date of the deed, and but for the express provision or reservation in the deed which we have already recited, whereby the appellee was allowed to retain possession of the property until default, the right of possession would also have vested in the trustees from the date of the deed."
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> 4 Appeal Cases D. C. 1.

If this be the law, then the right of the American Ice Company to the possession of the property embraced in the deed of trust terminated upon default in the payment of the bonds. That was one of the events upon the happening of which its right of possession was made to depend. The right of possession immediately accrued to the defendant, and the Landlord and Tenant Act furnished the proper remedy to enforce that right. In the case of Loring *vs.* Bartlett, *supra*, the purchaser from the trustee brought the suit. Here the trustee sues. In all other respects, the cases are similar in fact and identical in legal principle. In Loring *vs.* Bartlett the right of the purchaser from the trustees to sue was put upon the express ground that he held the trustees' title, and was substituted to their right by operation of law.

> "The property having been sold under the power in the deed after default made by the appellee, the purchaser became entitled to all of the rights vested in the trustees in regard to the possession of the

> premises, and is substituted to their rights in that respect by operation of law,"

is the language of the court. It was because the trustees were entitled to the possession of the property that the purchaser from them became entitled.

The conclusion reached by the court in this case is fortified by numerous decisions. Wilkerson *vs.* Hall was an action for double rent under the Statute of 4th George II, also for use and occupation. The court held that the provision in a mortgage permitting the mortgagor to retain possession until default in payment of principal or interest, or any covenant therein contained, operated as a re-demise to the mortgagor, until a violation of the covenants in the mortgage contained.

Justice Vaughn, in disposing of the case, said:

> "In modern times it has been usual to insert these special provisions in mortgage deeds, and the effect of this is to give the mortgagor complete control over the property as tenant for years to the mortgagee."
>
> 3d Bing. (N. C.) 508.

The case of Fisher *vs.* Giles, was an action of ejectment brought by th mortgagee against the mortgagor after default. The mortgage contained a clause permitting the mortgagee to enter upon the mortgaged premises upon default by the mortgagor in the performance of certain covenants set out in the mortgage. No notice to quit was served.

Chief Justice Best said:

> " We must look at the covenant he made with the mortgagee to ascertain what his real situation is. We find from the deed between the parties, that the possession of his estate is secured to him until a certain day, and then if he does not redeem his pledge by that day, the mortgagee has the right to enter and take possession. From that day the possession belongs to the mortgagee, and there is no more occasion for his requiring that the estate should be de-

livered up to him before he brings an ejectment, than for a lessor to demand possession on the determination of a term. The situation of a lessor on the expiration of a term, and of a mortgagor who has covenanted that the mortgagee may enter upon a certain day, is precisely the same."

5. Bing. 653.

The case of George's Creek Coal and Iron Company against Detmold was an action of ejectment brought by a mortgagor against a person other than the mortgagee. The mortgage contained a reservation permitting the mortgagor to retain possession of the mortgaged premises, until default in the covenants of the mortgage. The defendant set up an outstanding title in the mortgagee. The court held it was not available to him as a defense; that the reservation of the right of possession to the mortgagor, operated as a redemise of the premises to him, and he was entitled to possession until there was a breach of the covenants. The authorities in this case were carefully reviewed, and the case was thoroughly argued. 1st Md. 225. The decisions of the Supreme Court of the District of Columbia reach the same result, though not always by the same course of reasoning.

The Landlord and Tenant Act was passed July 4th, 1864. The first case on the interpretation of this statute was that of Spalding *vs.* Hall. The facts in this case were that the defendant was in possession of certain premises under a lease which was to expire June 30, 1864. On the 16th of June, the owner of the premises leased the same to the plaintiff for five years, commencing July 1st, 1864. No notice to quit was served on defendant, and he remained in possession after the expiration of his term. Plaintiff brought suit for possession under the Landlord and Tenant Act. The court held that the defendant Hall was a tenant from

year to year, and entitled to six months' notice, which was sufficient of itself to dispose of the case, but the court went further, and held that the true intent and meaning of the legislature was to extend this remedy to all persons, who, by act of the lessor, or by operation of law, were placed in the same relation to the tenant, as the original lessor, to wit, the grantees or assignees, devisees or heirs-at-law of the lessor. 6th D. C. 124. This case was decided November 21, 1864. Ten years later the case of Luchs *vs.* Jones was decided. This was an action brought by the plaintiff to recover the possession of the premises in controversy under the provisions of the act in question. The defendant had encumbered the premises in controversy by a deed of trust in the ordinary form to secure the payment of a debt therein described. Having made default in the payment of said debt, the property was sold by the trustee named in the deed of trust, and purchased by the plaintiff, to whom a conveyance had been made by the trustee. Plaintiff served the defendant with thirty days' notice to quit, on the theory that after the sale he was statutory tenant by sufferance. The court held that the action would lie. Justice MacArthur in deciding the case said:

> "I was of the opinion that the relation of landlord and tenant between the parties could not be inferred from these circumstances, so as to bring the case within the statute upon which it was founded. A careful examination of the language used in the first section has satisfied me that in this respect, my construction of the act was erroneous. All of the judges who heard the case here, are of the same opinion. . . . The simple fact of possession where there is no contract, is a sufficient circumstance to create such tenancy, and if a man, therefore, holds possession of premises belonging to another, and there is no agreement between them, the relation of landlord and tenant arises by mere operation of the statute."

It does not appear whether there was a clause in the deed

of trust under which the property was sold, providing for the retention of possession by the grantor therein, until default was made in the payment of the indebtedness. Inferentially it would seem that there was none. If there was, it was not considered by the court, nor referred to in any way in its opinion. Strictly speaking, this case is not an authority, for the reason that the court pronouncing it was without jurisdiction to hear the cause. Appeal was dismissed on that ground.

1st MacA. 346.

The case of Fiske *vs.* Bigelow was similar in its facts, and a like conclusion was reached by the court. The defendant in this case contended that there was a defective execution of the power of sale under the deed of trust, and that therefore the plaintiff had but an equitable interest in the property. The court denied the validity of the objection, and held that an equitable title was sufficient to support the action if the case was otherwise properly brought.

2d MacA. 431.

The case of Harris *vs.* Barber was brought to this court by writ of error to reverse a judgment quashing a writ of *certiorari* to a justice of the peace for the District of Columbia. It appears by plaintiff in error's petition for the writ of *certiorari* filed in the Supreme Court of the District of Columbia, that he was in possession of a certain house and premises situate in the city of Washington in said District, as tenant under a certain lease not then expired, the terms of which are fully set out in said petition. That the leased premises were sold under a certain deed of trust prior in date to that of the lease. The purchaser was the defendant in error, Barber, who served him with a thirty days' notice to quit, and then brought an action for possession under the Landlord and Tenant Act. The justice before whom the suit was brought gave judgment for Barber. The petition

averred that the proceedings before the justice were void for want of jurisdiction, because, *inter alia*, the relation of landlord and tenant did not exist between the said Barber and plaintiff in error, by convention, and that his proper remedy was by ejectment. The court below, on motion, quashed the writ of *certiorari*, and the case came here on error from that judgment. The case was heard on motion to dismiss or affirm. Justice Gray, for the court, said:

> "But upon the merits of the case, the judgment below is so clearly right, that the motion to affirm must be granted."
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> 129 U. S. 368.

The case below is reported in 6 Mackey, 593.

In the case of the District of Columbia *vs.* Rapley, the court held that where a *termor* remained in possession of the leased premises after the expiration of the lease, with the consent of the landlord, he became, by operation of the Landlord and Tenant Act, a tenant by sufferance, and that such tenancy might be terminated by a thirty days' notice to quit.

6 Mackey, 534.

The case of Jennings *vs.* Webb was an action brought by one tenant in common against another who was in adverse possession of the property in question. There was no contractual relation between the parties. It was a simple act of ouster by one tenant, and claim of title in himself. The court held that the Landlord and Tenant Act did not apply to such a case—that the remedy therein provided was not intended to supersede the action of ejectment.

20 D. C. 321.

This same doctrine had been announced in the case of Fiske *vs.* Bigelow, *supra*.

After discussing these cases, counsel for plaintiffs in error

make the statement that only five instances (those above referred to) of attempted application of the Landlord and Tenant Act to other than the conventional relation of landlord and tenant can be found in the thirty-three years which have elapsed since the passage of the act. While only that number of cases are *reported*, the fact is that ever since the decision in Luchs *vs.* Jones, *supra*, rendered in 1874, this statute has been uniformly applied by the justices of the peace and the Supreme Court of the District of Columbia to aid purchasers under deed of trust sales to obtain possession of the property so purchased, so that a rule of property to that effect had been established when the case of Loring *vs.* Bartlett arose and was contested in the elusive hope, evidently, that the new appellate court might disregard the rule and reverse the decisions of the old general term.

Counsel for plaintiffs in error seek to support their contention "that the deed of trust did not create the grantor a tenant or make the grantee his landlord," by the citation of several decisions by state courts, and of a decision by this court in Burnett *vs.* Caldwell, 9 Wallace, 290. This case came up from Georgia, and was an action of ejectment by Caldwell, who had sold the property involved to one Vliet under a contract of purchase silent as to the right of possession; but Caldwell, nevertheless, had put him in possession, after which Vliet sold to the plaintiff in error; default was made under the contract of purchase; Caldwell treated it as rescinded and brought ejectment, in which he recovered judgment, and this court found no difficulty in affirming the same. In the light of these facts, it is difficult to perceive what relation or application the words quoted from the opinion in said case (page 28 of their brief) or the case itself has to the present controversy.

The cases cited under the same head from Massachusetts, Mississippi and Vermont might have consistently been decided otherwise had the statutes in said States contained the

peculiar provision relative to tenants at will and at sufferance contained in our statute. In MacCombs *vs.* Wallace, 66 N. C. 483, the deed of trust contained the simple recital of an understanding that the grantor should retain possession. It lacked the formal declaration of a trust in that behalf upon which the trustee was to hold the title as in this case: besides the North Carolina statute under which the case was brought is much more limited in its scope than ours, as appears from the extract therefrom, *infra*, page 21. Simms *vs.* Humphrey, 4 Denio, 185, was the case of an absolute deed, containing a reservation or exception as to possession until April 1st, 1844, in favor of the grantor. The construction of a clause similar to that now under consideration was, therefore, not involved in that case.

The attempt of counsel for plaintiff in error to distinguish the case at bar from Loring *vs.* Bartlett and to construe the clause of redemise into a reservation of the possession to the American Ice Company by virtue of its original title, is, it is submitted, forced, and is unwarranted by the similarity in language and legal effect of the clauses in both deeds. The present case is stronger than the other, if anything, because the trustee also executes the deed, while in the Loring *vs.* Bartlett only the grantor executed it. The words "In the same manner, to the same extent and with the same effect as if this deed had not been made" express only the legal consequence of the declaration of the trust upon which the trustee, until default, was to hold the title, and, had they been omitted altogether the interest and rights of the American Ice Company would not have thereby been diminished or affected.

The adoption by courts of other jurisdictions of the lien theory in respect of mortgages, and the incorporation of equitable doctrines into the common law as administered in many of the States (independently of or previous to the adoption of codes) it renders the decisions of such States of

little or no value in the present case. It was said in this court by Mr. Justice Barbour in deciding Van Ness *vs.* Hyatt, 13 Peters, 299:

> "In 6 Gill. & Johns. 72 it is decided that a mortgagor cannot maintain trespass against a mortgagee. On the contrary in 11 Johnson (N. Y.) 534, it is decided that a mortgagor may maintain trespass against the mortgagee. In 4 Kent's Com. 154, it is said that an equity of redemption is chargeable with the dower of the wife of the mortgagor. On the contrary this court, in the case of Steele *vs.* Carroll, at the last term, 12 Peters, 201, professing to follow the law of Maryland, in other words, the common law, decided, that the widow of the mortgagor was not dowable of an equity of redemption. Now, why these contrary decisions upon these two important points, in relation to the interest, nature and character of the interest and title of a mortgagor? There can be but one answer. That in New York and other States following a similar course, the courts of law had, by a gradual progress, adopted the views of a court of equity in relation to mortgages; and considered the mortgagor, except as against the mortgagee, whilst in possession and before foreclosure, as the real owner, and even as against the mortgagee having the right of possession; whilst in Maryland, as we learn from the case before referred to, in 6 Gill. and Johnson, the legal estate is considered as being vested in the mortgagee; and that as soon as the estate in mortgage is created, the mortgagee may enter into possession, though he seldom avails himself of that right. In these antagonistic doctrines, we have the clue to the opposing decisions of the courts. Neither dower can be recovered nor trespass maintained, where there is a mere equity; nor where that is the case can a *fieri facias* be levied. The same principle then precisely, which in Maryland precludes the recovery of dower by the widow of a mortgagor, or the maintenance of an action of trespass by a mortgagor against a mort-

> gagee, exempts also the equity of redemption of a mortgagor from being liable to execution."

The same course of reasoning would warrant the court in the case at bar in refusing to consider any of the numerous cases cited by counsel for plaintiffs in error in their brief, under the caption "The conventional relation of landlord and tenant must exist to bring a case within the true intent and meaning of landlord and tenant statutes."

Should, however, the court desire to enter upon a consideration of said cases, the following brief review thereof is subjoined for the purpose of showing the inapplicability in any sense whatever of a large number of said decisions to the real question at issue, in this connection, in the present case.

Steiner *vs.* Priddy, 28 Illinois, was an action of forcible detainer by a judgment creditor against the judgment debtor, the former claiming the property in question by virtue of a sale under his judgment on execution, at which he had purchased. The case is authority only for denial of such summary relief to a purchaser at a sheriff's sale on execution, in which no contract relations of any sort, relative to the property sold, exist between the party in possession and the purchaser.

In West *vs.* Frederich, 62 Ill., the question decided was that one who loaned money and took an absolute deed from the borrower with an agreement to reconvey in one year on repayment of the money, was not entitled upon failure at the end of the year on the part of the borrower to pay the money or to give up possession of the property, to avail himself of the provisions of the following Statute of 1861, gross 361, viz. [The action of the forcible detainer is extended]:

> "To all cases between vendor and vendee where the latter has obtained possession of the land under a contract by parol or in writing, and before obtain-

> ing a deed of conveyance of the same, fails or refuses to comply with such contract to purchase."

The court found that the plaintiff failed utterly to bring himself within the terms of this statutory provision, under which he had sued, as the defendant was not put into possession by the plaintiff under a contract of purchase at all.

Short *vs.* Bridwell, 15 Ind. 211, is an incompletely reported case, the facts not being stated. All that can be gathered from the opinion is that the suit was an attempt to recover possession of land which the defendant held adversely, and from which he could therefor be only evicted, if at all, by ejectment.

MacCombs *vs.* Wallace, 66 N. C., the same case heretofore shown to be easily distinguishable from the case at bar, because of the lack of similarity between the clause providing for retention of possession (p. 18) in the one case and the clause of redemise in the other, is equally inapplicable as an authority in support of the other proposition for which it is cited, as appears from a perusal of the statute under which it was decided, the important part of which is in the following language, viz.:

> "Any tenant or lessee of any house or land and the assigns under tenants or legal representatives of such tenants, who shall hold over and continue in the possession of the demised premises, or any part thereof, without permission of the landlord, and after demand made for its surrender, may be removed from such premises in the manner hereinafter prescribed in either of the following cases, viz.:
>
> "1. 'Whenever a tenant in possession of real estate holds over after his term has expired.'
>
> "2. 'When the tenant or lessee or other person under him has done or omitted any act by which, according to the stipulation of the lease, his estate ceased.'"
>
> Acts of 1868–9 (N. C.), Ch. 156.

Greer *vs.* Wilbar and Johnson *vs.* Hauser, two other North Carolina cases cited by counsel in their brief in the present case, were decided under this same statute; which, by its language, may certainly be confined to the conventional relation of landlord and tenant with far more reason than can the District of Columbia statute.

C. B. Q. Road *vs.* Skupa, 16 Neb. 341, was brought under sections 1019 and 1020, Revised Statutes of Nebraska, which the court refers to in its opinion. Section 1019 gives any justice within his county power to inquire as well against those who make unlawful and forcible entry into lands and tenements and detain the same as against those who, having a lawful and peaceful entry, unlawfully and by force hold the same. By Sec. 1020, proceedings under this act may be had in all cases against tenants holding over their terms, in sales on executions, orders or other judicial process against the debtor, etc., in possession, in case of sales by executors, administrators and guardians, partition sales, and against persons in possession without any color of title. The railroad company had sold the land in question to defendant, who went into possession pursuant to his contract of purchase, and failed to make payments as agreed. The court were of opinion that this state of facts did not bring the case within the terms of the above statute, between which and the District of Columbia statute there is certainly little resemblance.

Leavitt *vs.* Wallace, 12 N. H. 493, was another case of adverse holding on defendant's part in which the question of title was the only question to be tried, and therefore ejectment was the only remedy. Plaintiff's attorney in his brief admitted that the title was involved, but contended that the New Hampshire statute was broad enough to try the title to land. The court held the contrary.

Some of the New York cases cited rely upon the general principle as to mortgages laid down in the case in 11 Johnson which, as above shown, this court has decided (in Van Ness *vs.* Hyatt) to be contrary to the law as interpreted and

applied in Maryland and this District, and all of said cases proceed on a narrow construction of the New York statutes as compared with the uniform course of the District of Columbia courts in construing our own act.

The Vermont statute expressly confines relief to the case of a written lease or to a proceeding against one who is "the lessee of lands;" hence the decision in Davis *vs.* Hemenway, 27 Vt., cited by plaintiff in error. Aside from this difference in the statute the case itself is not applicable on the facts to the present controversy, since there was no contract whatever between the parties from which a lease could have been implied. Defendant being the owner of certain land conveyed the same to one Jacob Davis in consideration of $1,000, and said Davis thereupon gave to a trustee for defendant a writing by which he agreed to reconvey to the defendant in three years upon payment of $1,000, and $60 annually, taxes, etc. After this contract had been assigned to other parties who made default under it, and after a similar contract had been again made between said J. Davis and defendant, and the time for payment limited thereunder had expired, said J. Davis sold and conveyed to the plaintiff, who, as owner by virtue of the deed from J. Davis to him, brought this action to recover possession. The court held that the transaction between the defendant and the plaintiff's vendor amounted to an equitable mortgage, that defendant still had the right to redeem the property therefrom, and (from the evidence on that point) that the plaintiff had knowledge of the true state of affairs at the time of his purchase, and could therefore not dispute the right of defendant to his equity of redemption, or deprive him of his possession, by a landlord and tenant proceeding. In the trust deed in the case at bar the right to redeem is expressly waived.

While the language quoted from the opinion in Steele *vs.* Bond, 28 Minn. 267, is in accord with the argument of counsel for plaintiffs in error here, the only matter *decided* in the case was that where a plaintiff claimed under a written

lease which the defendant claimed was executed as security for a loan and intended as a mortgage, it was error for the justice to proceed with the trial of the case instead of sending it at once to the District court. It appears from the opinion that had the case been certified in due form to the District court and the defendant's defense proven, it would have been the duty of the District court to dismiss the action, in other words, that the Minnesota Landlord and Tenant Statute does not apply to the case of an equitable mortgage under which no foreclosure has been had. But this is due to the fact that the Minnesota statute contains *express* provision for the relief of a mortgagor *after* foreclosure, and, therefore, by necessary implication, denies it to him *before* foreclosure. The portion of this statute, which is quoted and construed in this case, is as follows:

> "When any person holds over any lands or tenements after a sale thereof on an execution, judgment, *or on a foreclosure of a mortgage by advertisement and expiration of the time for redemption*, or after the termination of the time for which they are demised or let to him, or to the person under whom he holds possession, or contrary to the conditions or covenants of the lease or agreement under which he holds, or after any rent becomes due according to the terms of such lease or agreement, or after any tenant at will holds over after his estate is determined by notice to quit,"

he may be proceeded against as thereinafter provided.

Gen'l Stat. of Minn., 1878. Revision, Sec. 6118.

The plaintiff, in People *vs.* Hovey, 4 Lansing, 89, would have failed as certainly in this District as in New York, as the proof disclosed a case of adverse holding by one party under a tax title and by the other under a receiver's deed. Recourse was had to these summary proceedings solely because plaintiff contended that the defendant had gotten into

possession through collusion with his, the plaintiff's, tenant, but he failed to establish this contention.

Mitchell *vs.* Simpson, 3 R. S. 14, Abb. Pr. 460, as well as People *vs.* Simpson, 28 N. Y. 56, failed because the court decided the facts in the case did not make the defendant tenant by sufferance of the plaintiff. In one case the defendant was a grantor in possession—the case of an actual sale in which possession had not been duly delivered—in the other case Mitchell went into possession under a written lease, which he afterwards assigned to A. S., who assigned to I. S. The court held that the statement of law in the affidavit upon which the action was instituted, to the effect that, upon the above facts, Mitchell was tenant by sufferance to I. S., was erroneous. These actions were brought under a statute (See 3d Rev. Stat. N. Y. 863, 5th Ed.) providing that any tenant at will or at sufferance might be removed, etc., when he held over after the expiration of his term without permission of his landlord. This statute left the court to define what was meant by tenants at will and at sufferance, and so permitted a narrow construction of the latter term, unlike our own statute which in itself contains in legal effect an interpretation of "tenancy at sufferance," and that on very broad and liberal lines (Sec. 4).

CONCLUSION.

It will thus be seen that by virtue of the common law as interpreted and applied in this District, and also by the express contract contained in the deed of trust, the American Ice Company became, upon the execution and delivery of the deed, the tenant of the Eastern Trust and Banking Company, and, upon default, the latter became entitled to appeal to the proceedings provided for by the Landlord and Tenant Act to obtain possession.

The notice to quit was served prior to the sale. The de-

fendant promised at the time of the sale, to obtain possession for the purchaser, to finish what it had commenced. The purchaser has not complied wlth the terms of sale. The trustee has not obtained possession of the property, and, until it has, cannot compel the purchaser to complete his purchase. The sale was conditioned upon the obtaining of possession by the trustee, and is abortive and goes for naught unless it is obtained. The trustee is in default and not the purchaser. The announcement that the trustee would obtain and deliver possession to the purchaser, may well have had a material influence upou the bidding. The trouble, expense and delay incident thereto were things of value, not to be held for naught. It is respectfully submitted that the judgment below ought to be affirmed.

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